

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 May 2025

**Public Authority:** The Governing Body of King Edward VI  
Academy Trust Birmingham

**Address:** Foundation Office  
Edgbaston Park Road  
Birmingham  
B15 2UD

#### **Decision (including any steps ordered)**

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1. The complainant requested information about admissions for disadvantaged children. King Edward VI Academy Trust Birmingham (the Trust) provided the majority of information but withheld the cost of entrance tests under section 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that the Trust has not demonstrated why section 43 was engaged and consequently is not entitled to rely on this exemption.
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information, namely the cost of the entrance tests.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 12 November 2024 the complainant wrote to the Trust and requested information in the following terms:

"In 2014, the Schools Admissions Code was updated to permit admissions authorities to give preference to "disadvantaged" children. (More formally, section 1.39A allows admissions authorities to prioritise, "children eligible for the early years pupil premium, the pupil premium and also children eligible for the service premium"). I am seeking the following information relating to the admissions arrangements.

1. Has the school changed its admissions arrangements since 2014 to give preference to any of the above premiums?

2. If so

- a. What was the first date children were admitted under the new arrangements.
- b. What changes were made to the admissions arrangements.

3. How many children sat the school's entrance test in 2024?

4. If the test is provided by an external company, how much does it cost?.

If the school is either a Community or Voluntary controlled school and therefore not responsible for admissions, please advise which public authority can provide this information.

If the school is a member of a consortium that collectively arranges the test it may be more efficient to provide a coordinated response from all member schools".

6. The Trust responded on 18 November 2024 and provided the information requested, with the exception of part 4 of the request concerning costs, which it withheld under section 43 of the FOIA.
7. On 19 November 2024 the complainant requested an internal review in relation to the application of section 43 of the FOIA to part 4 of the request.
8. The Trust provided the outcome of its internal review on 20 November 2024 and upheld its decision that section 43 applied to part 4 of the request.

## Scope of the case

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9. The complainant contacted the Commissioner on 26 November 2024 to complain about the way their request for information had been handled.
10. The scope of the Commissioner's investigation into this complaint is to determine whether the Trust correctly applied section 43(2) of the FOIA to part 4 of the request for the costs of the tests.

## Reasons for decision

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### Section 43 – commercial interests

11. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
12. In order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged should be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, ie disclosure 'would be likely' to result in prejudice or disclosure or 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

13. The Commissioner's guidance on section 43<sup>1</sup> states that a commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.

### **The Trust's position**

14. The information which the Trust has withheld in this case relates to the cost of entrance tests in 2024. The Trust confirmed that it is relying on the lower level of prejudice, ie that disclosure would be likely to prejudice the commercial interests of both the Trust itself and GL Assessment, the test provider.
15. In terms of its own commercial interests, as it is publicly funded, it is important that the Trust is able to obtain the best value for money in respect of the funds it receives. The Trust utilises a formal procurement process when engaging a test provider.
16. The Trust argues that disclosure of the cost of tests in 2024 would undermine the procurement process and in turn affect its ability to get the best value for money. It considers that disclosure of the withheld information in this case "would serve as an advertisement of the sort of sum which the Academy Trust is willing to pay and thus undermines its bargaining position".
17. The Trust pointed out that there is a limited number of grammar school test providers. If competitors of GL Assessment were to become aware of the costs associated with its tests, they would be likely to submit tenders at a level slightly below the price paid, rather than submit tenders at a price they felt to be commercially advantageous, which potentially could be at a much lower price. As a result, the Trust contends that disclosure would be likely to lead to it having to pay a higher price. It considers that this would be the case if a new provider entered the tender process as disclosure of the amount paid in 2024 "would lead them to pitch slightly below that level even if the reality is that they could offer a much lower price".
18. The Trust also argues that the withheld information constitutes sensitive commercial information of GL Assessment. It contends that disclosure would be likely to harm the commercial interests of GL Assessment by putting it at a disadvantage to its competitors, including other organisations that provide similar services to schools in the UK, such as the Independent Schools Examination Board, or Future Stories

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

Community Enterprise (among others). The Trust considers that this would be unfair as GL Assessment's competitors would not be required to disclose similar information as they are not subject to the FOIA. As such, disclosure would undermine GL Assessment's ability to maintain a competitive bargaining position in respect of any future contracts or tender processes.

19. The Trust considers that disclosure would result in there no longer being a level playing field as GL Assessment's competitors would have knowledge of the costs they charge but GL Assessment would not have the same information about its competitors. The result of this would be that GL Assessment would be less likely to win future tender processes than "in a fair competition with parity of information". The Trust considers that this would have a direct adverse impact on the revenue of GL Assessment.
20. The Trust confirmed to the Commissioner that it had consulted with GL Assessment on receipt of the request to ascertain their views on disclosure and provided copies of correspondence it had had with the provider. As well as outlining the harm it envisaged would be caused to its commercial interests it confirmed that it considered the information to be sensitive business information and referred to the confidentiality clause in respect of such information contained with the current service agreement and contract.
21. In their complaint to the Commissioner the complainant stated that they had submitted similar requests to other educational organisations who had contracted with the test provider and they had disclosed the cost of entrance tests. The Commissioner asked the Trust about this point. The Trust advised that it believes the disclosures referred to by the complainant include other internal costs, such as the costs of invigilation, and not just the costs associated with the test provider. As such, the Trust contends that such disclosures do not carry the same risk of commercial prejudice.
22. However, the Commissioner has carried out his own research on the [whatdotheyknow.com](http://whatdotheyknow.com) website and it would appear that other educational institutes have disclosed the cost of the tests.

### **The Commissioner's view**

23. The Commissioner is satisfied that the first limb is met given that the nature of prejudice envisaged to the commercial interests of both the Trust and GL Assessment are ones that fall within the scope of the exemption provided by section 43(2).
24. In relation to the second limb, the Commissioner considers that any organisation that contracts with a public authority should be aware that

some information about their contractual relationship may need to be disclosed under the FOIA. Furthermore, when organisations tender for contracts it is in their interest to tender the best price possible in order to remain competitive, rather than simply tender a price which is slightly below a price that has previously been accepted as a winning tender. Finally the Commissioner considers that price is only one element that is taken into account when an organisation undertakes a tender evaluation exercise to determine who to award any contract to.

25. The Commissioner accepts that all contracts will have confidentiality clauses. But this alone is not enough to warrant the non disclosure of information under the FOIA. If it was it would defeat its purpose. The legislation has been in force for some time and all public authorities and private sector companies wishing to bid for public sector contracts should be aware of its requirements and implications. Those clauses (as is section 43 of the FOIA itself) are designed to protect genuinely confidential and commercially sensitive information and the determination of that should be based on a review of the information contained within a contract; not a blanket approach to non disclosure.
26. Turning to the prejudice to the Trust's own commercial interests, whilst the Commissioner accepts that disclosure would provide competitors of GL Assessment with information as regards the costs of entrance tests in 2024, the Commissioner does not accept that this would be likely to lead to companies in the future simply submitting marginally lower bids in future tender exercises. He considers that it is in a company's interests to submit as competitive a bid as possible in any tender exercise. Again, the Commissioner would point out that price is only one element that is taken into account when an organisation undertakes a tender evaluation exercise to determine who to award any contract to.
27. For the reasons set out above, The Commissioner is not satisfied that the Trust has evidenced a likelihood that disclosure would cause prejudice to the interests that the section 43 exemption protects. As the exemption is not engaged, the Commissioner has not gone on to consider the public interest arguments.

## **Right of appeal**

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28. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

29. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**